# Board of Alien Labor Certification Appeals

**UNITED STATES DEPARTMENT OF LABOR**
**WASHINGTON, D.C.**

**'Notice: This is an electronic bench opinion which has not been verified as official'**

DATE: February 28, 1997

CASE NO: 95-INA-502

**In the Matter of:**

**TIFFANY & COMPANY**
**Employer,**

**On Behalf of:**

**CHIKASHI ITOGA,**
**Alien**

Appearance: J. G. Parilla, Esq.
New York, N. Y.
for the Employer and the Alien

Before: Huddleston, Holmes, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

## DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Chikashi Itoga, (the Alien) filed by Employer Tiffany & Company (the Employer) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations adopted thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U. S. Department of Labor at New York denied the application, and the Employer and the Alien requested review under 20 CFR § 656.26.

**Statutory authority**. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient able, willing, and qualified workers, who are available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the

alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. An employer desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and such written argument as appears in the file. 20 CFR § 656.27(c).

**STATEMENT OF THE CASE**

**Application**. On June 28, 1992, the Employer applied for labor certification to enable the Alien, a Japanese national, to fill the position of "Manager, Japan Sales Administration" in this sales and marketing firm specializing in fine jewelry and other luxury goods, which is located in New York, New York.

The duties of the job to be performed were as follows:

> (In restructuring company, emphasis will be on sales & distribution rather than as wholesalers). Manage staff of 5-6 coordinators, Japan Sales, Support & Administration, who will act as liaison with Japan operation which is expanding from 8 outlets to 36. In charge of new store openings, selection of products, sales, distribution and marketing.

This position is a "Manager, Sales" under Occupational Code 163.167-018 of the Dictionary of Occupational Titles, Employment and Training Administration, U. S. Department of Labor, based on the CO's analysis.[1] The academic requirement was a four year college education, including a baccalaureate degree in "Liberal Arts/Philosophy/retail related Business Fields." The required experience is one year in the job offered or two years in "Sales & Marketing (Far East) exposure," as the related occupation. The other special requirement was "Experience with Japan." The hours and salary are thirty-five hours a week from 9:30 A.M. to 5:30 P. M., for $50,000 per year. The Employee will work under the Employer's Senior Vice President, Far East Division. The worker would supervise six employees. AF 16.

The Alien's qualifications included a baccalaureate degree in liberal arts with a major in philosophy. Alien's background

[1]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

after graduating from college was employment in Sotheby Auction House, including a seminar in watches, including their history, technical aspects, appraisal and "collectability." As the "focus" of his undergraduate studies in philosophy, the Alien also took courses in aesthetics . AF 14. At the time the application was filed the Alien was "Manager Japan Sales Administration" in the Employer's business, having first worked for the Employer as Coordinator-Far East Trade (Practical Training). During this period between August 1990 and July 1991 the Alien was engaged in learning the job and making contacts in the Far East. He was promoted to "Management Assoc. Japan Sales Administration, in July 1991, and remained in that position for two years until June 1993, when Employer changed his title to "Manager Japan Sales Administration" and restructured its overseas operations and the same month when the Employer filed this application. AF 13, 14.[2]

**Notice of Findings**. On January 19, 1995, the CO's Notice of Findings (NOF) advised the Employer that the Department of Labor intended to deny the application, and authorized the applicant to rebut the findings or remedy the defects noted.

1. Noting Employer's academic specification for a job opening as Sales Manager to be a baccalaureate degree in liberal arts, philosophy, or retail related business fields, the CO said this requirement was restrictive within the meaning of the Act and regulations. The Employer was allowed to rebut by reducing the academic requirement to the DOT standard or by documenting how this requirement arises from business necessity.

2. Employer's wage offer of $50,000 was found to be below the prevailing wage, $68,000. The CO rejected as the criterion for the prevailing wage the Employer's evidence of a contemporary survey of salaries and benefits paid to U. S. based workers of Japanese companies located in the New York geographic area, reasoning that the source did not reflect the same job duties and education requirements for wages paid to workers similarly employed in the intended area. The CO pointed out further that the Employer is not a Japanese company doing business in America, but an American company doing business in Japan. Rebuttal, said the CO, would require either further documentation supporting its version of the prevailing wage or amendment of the pay rate offered for this job. AF 36-37.

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[2]On November 22, 1993, an Examiner in the Alien Employment Certification Office of the Department of Labor of the State of New York advised the Employer, "It is noted that the alien had no experience in this occupation prior to employment with this Employer. Employer must reduce the requirement, or may submit evidence which shows the alien had the qualifications required prior to being hired, or must document why it is not feasible to train a U. S. worker at this time."

**Rebuttal**. The Employer responded on February 15, 1995, in a letter signed by its Associate General Counsel. First, without further documentation, Employer attached as supporting evidence a photocopy of pages 1022 and 1024 of a publication labelled "Wyatt Data Services," to support its assertion that the CO had used the wrong industry sector of applicable data in arriving at the finding as to compensation level. The Employer challenged the judgment of the CO in evaluating the similarity of this position to pay groups of middle management, based on the work done and the salaries paid. The Employer did not challenge the CO's finding that the educational qualifications should include all majors in the business field, agreeing to readvertise the position as amended in that regard. AF 45-46.

**Final Determination.** After reviewing Employer's rebuttal, the CO denied certification in the Final Determination (FD), dated March 13, 1995, rejecting the Employer's rebuttal under 20 CFR § 656.20(c)(2), which requires that Employer's wage offer must equal or exceed the prevailing wage level. The CO explained that the rebuttal objected to the prevailing wage determination in the NOF on grounds that (1) it did not take into account the particular industry involved and (2) the CO's determination was based on compensation data for "middle management" positions in general, rather than for the particular position for which this application was intended. The CO pointed out, moreover, the Employer failed to submit countervailing evidence that the CO was in error in designating the prevailing wage, or that the Employer's wage offer did, in fact, equal or exceed the correct prevailing wage. AF 48.

**Employer's brief**. On appeal Employer repeated the arguments it made in rebuttal to support its position that the offer was consistent with the prevailing wage. Because Employer contends that its principal business is the retail and wholesale sale of jewelry and other goods and accessories, it argued that the prevailing wage should be based on the retail and wholesale trade industry sector for Manager of Marketing Administration and Sales Promotion Manager in the data services job classification that it attached to the rebuttal. Employer then offered definitions of the job functions encompassed by these classifications without support of any documentation in its rebuttal evidence or in any other source. The Employer then cited the contents of the 1994 Wyatt Data Services compensation survey in support of its arguments concerning the average salary paid to Managers of Marketing Administration in the Retail and Wholesale Trade Industry. The Employer concluded that, based on its reasoning from this source, the Employer's wage offer of $50,000 is "perfectly consistent" with the prevailing rate of pay for the Sales Manager position and that the CO's determination that $68,000 was the prevailing wage for that position was wrong, as

it was based on an incorrect concept of the position and the appropriate data to apply.

**Discussion**. When challenging the CO's prevailing wage determination, an employer bears the burden of establishing both that the CO's determination is in error and that the employer's wage offer is at or above the correct prevailing wage. **PPX Enterprises, Inc.,** 88-INA-25(May 31, 1989)(en banc); and see **Sun Valley Co.**, 90-INA-391(Jan. 6, 1992); and **Tse Yu Chun, M. D.**, 90-INA-413(Nov. 19, 1991). It is the employer's burden to demonstrate "by a preponderance of the evidence that its survey is both accurate and relevant." **Ren-Mar Studios**, 90-INA-205(Sept. 30, 1992).

It must be concluded that the CO's finding as to prevailing wage was correct and the Employer's arguments must be rejected on grounds that the Employer's assertions of fact concerning the definition it advocates in the Wyatt Data Services compensation survey are not based on any evidence of record, and so are rejected. The Employer argues that the CO's conclusion as to the prevailing wage relies on a job description with which it disagrees, advocating instead that the correct amount is to be found in some other class among the multiple categories that the Employer found in a source of its own choosing that is not in this record. In a few words, in deciding whether or not the description of the position in question matches the data that is given in the document to which Employer refers, the Employer's argument cannot be followed without access to the survey definitions necessary to the analysis of its position. Moreover, the two pages it supplied in the rebuttal are themselves unclear, as the meaning of the various sets of data and job titles are unrelated to eachother by text that describes any points of reference that are useful in understanding its job offer. As the Employer failed to establish the fundamental definitions and other elements of proof necessary to explain and pursue its argument on the issue that it attacked in the rebuttal the Employer failed to sustain its burden of proof.

Accordingly, the following order will enter.

**ORDER**

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk**
**Office of Administrative Law Judges**
**Board of Alien Labor Certification Appeals**
**800 K Street, N.W., Suite 400**
**Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

# BALCA VOTE SHEET

Case Name: **TIFFANY & COMPANY, Employer,**
**CHIKASHI ITOGA, Alien**

CASE NO. : 95-INA-502

PLEASE INITIAL THE APPROPRIATE BOX.

| | CONCUR | DISSENT | COMMENT |
|---|---|---|---|
| Holmes | | | |
| Huddleston | | | |

Thank you,

Judge Neusner

Date: February 24, 1997